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Supreme Court of the United States

NOVEMBER TERM, 1901. No. 403.

LOUISA V. KIDD, as Executrix of the Will of H. B. TULANE, Deceased, Plaintiff in Error.

v.

THE STATE OF ALABAMA, Defendant in Error.

Reply Argument of W. A. GUNTER for the Plaintiff in Error.

FIRST POINT.

The first point of the argument by Messrs. Caffey & Breckenridge is, that the pleas purported to answer the whole complaint, and if they do not answer the entire demand they were open to the demurrer. The answer to which is, First, that the pleas do in fact answer the whole complaint, and second, that the demurrer can not be considered except as to the specific objections noted—and the argument of counsel admits that the ground of objection which is argued was not stated in the demurrer.

The Code of Alabama, § 3303 is: "No demurrer in pleading can be allowed but to matter of substance, which the party answering specifies; and no objection

can be taken or allowed which is not distinctly stated in the demurrer."

If the ground had been good, and had been stated, the pleas could have been amended so as to narrow them to meet the objection.

Turner v. Glover, 101 Ala. 294.

The argument in chief, however, sufficiently shows we think that the assessments under both the Codes of Alabama are open to the same fault.

SECOND POINT.

The second point is a denial that taxation, under the Code of 1886, of citizens on shares in foreign corporations and the exemption of domestic shares, deprives plaintiff, as the owner of foreign shares, of the equal protection of the laws.

Five reasons are assigned for this conclusion:

First. That the State may discriminate if the "discrimination is reasonable in principle." This we admit to be true.

Second. "There is no fixed test of what basis of classification is reasonable." This also we admit to be verbally true. But it does not follow that there is no "fixed principle" applicable to all cases. And we deny that the State can tax A. on the value of his property, having its situs within the State for taxation at a greater rate than B. on the value of the same class of property because the latter happens to own shares in domestic instead of foreign corporations. When items of property are of the same actual and physical class, and have a value in the market, the basis that taxes the one be-

cause the value is an ownership in shares of a foreign corporation and exempts the other because it is an ownership in shares of a domestic corporation appears to be "arbitrary, oppressive and capricious."

The conditions of the owners are identical—they are taxed on shares solely on account of their personal domicil. Figuratively, the shares of one follow his residence that they may be taxed, and figuratively the shares of the other also attach to the locus of his residence. If the residence is in a given city the owner can only be taxed there, though the shares may be in a railroad in a different section of the State.

Boyd v. Selma, 96 Ala. 144.

The case of Pacific Express Co. v. Seibert, 142 U. S. 352, referred to by counsel, has already been considered in the argument in chief. See pages 18 to 19.

Third. The third reason of counsel is that the State may encourage investments within her bounds by taxing to death foreign investments. This, if sound, would allow the State to tax property of its own citizens at a different rate to that imposed on the same property owned by citizens of other states, and thereby encourage immigration of persons.

Fourth. The fourth reason is that a law of discrimination against the owner of foreign shares prevents escapes from taxes. We do not see the force of this. The right to shoot an innocent man, to prevent an escape if crime should be committed, is a new political or legal dogma to which we cannot subscribe.

Fifth. The fifth reason is that value is not the "sole basis of taxation." This may be admitted. The rule

is properly laid down in the quotation made by counsel from 148 U. S., 662, viz: "That there must be no discrimination in favor of one as against another of the same class." There is such discrimination when the red-headed man pays double taxes for being ugly, while the dark-haired citizen is exempt or pays a single tax; and the discrimination is no less glaring when it taxes the owner of foreign shares and exempts the owner of domestic shares.

The conclusion of counsel shifts the argument from one relating to the taxation of individuals to a classification and taxation of corporations. There is no such question in this case—which relates entirely to the taxation of persons on the values of intangible property *possessed by them at their domicil* within the State. By fiction of law such property has its legal *and thus actual* situs as the domicil, and if by its natural properties there is but one class, there can be no discrimination as to items because by historical association or connection with a foreign corporation one value takes its head beyond the State, while the other has its source within the State. Apples or other products *within the State*, and they must be within this jurisdiction to be taxable, when listed for taxation cannot be classified into products of foreign or domestic growth—neither can intangible property, which, after all, is but a *thing, in action*. The power to tax a thing *in action* by a classification having reference solely to the *locus a quo*, implies the power to tax the same thing *in possession* with reference to the same *locus a quo*. And the existence of such a power would override the constitution and establish within our border the abominable Chinese Linkin. While the State may as a condition of doing business within its borders to some extent make its own terms with foreign corporations, it has no such power as to

citizens of the States; they may reside where they please and invest their capital where they please, and the State is absolutely without power to discriminate against an investment beyond its borders. If it assumes to tax such property it must do it by the same measure and rule as that by which similar investments at home are taxed.

It is a departure in logical reasoning to say that corporate property represents shares for taxation within the State, but does not represent shares without the State.

W. A. Gunter

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